



ATTORNEY GENERAL OF TEXAS
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OR2006-03288

Dear Mr. Mondville and Mr. West:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 245358.

The Texas Department of Criminal Justice (the "department") received a request for twelve categories of information regarding eight correctional officers. The department and the Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG states that it will release the basic information on all responsive files to the requestor with redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).¹ The OIG also states that it is withholding social security numbers under section

¹Open Records Letter No. 2005-01067 serves as a previous determination for the department that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former

552.147 of the Government Code.² The OIG claims that the remaining information in its possession is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. The department states that it has also released the basic information relating to all the responsive files with the social security numbers redacted pursuant to section 552.147. The department claims that the remaining information in its possession is excepted from disclosure under section 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Both the department and the OIG raise section 552.134 of the Government Code, which relates to inmates of the department and provides in relevant part the following:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

...

employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). Case number 04-112TDCJ submitted by the OIG does not involve an inmate. Further, although case number 93-0229TDCJ pertains to an inmate confined in a facility operated by the department, section 552.134(a) is not applicable to “information about an inmate sentenced to death.” *Id.* § 552.134(b)(2). However, the remaining information submitted by both the department and the OIG concerns inmates who were confined in a facility operated by the department and who have not been sentenced to death. The information at issue includes investigations of incidents involving the use of force and alleged criminal conduct involving inmates. Thus, the department and the OIG must release basic information concerning these incidents. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. Accordingly, with the exception of basic information and case numbers 04-1121TDCJ and 93-0229TDCJ, the department and the OIG must withhold the submitted information under section 552.134 of the Government Code.⁴

We next address the OIG’s argument that the remaining information at issue is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

Gov’t Code § 552.108(a)(1), (a)(2). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The OIG states that case number 04-

⁴As our ruling is dispositive for this information, we will not address the other exceptions raised for it.

1121TDCJ relates to a pending criminal prosecution. Therefore, we conclude that release of this information would interfere with the prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (court delineates law enforcement interests that are present in active cases).

We note that section 552.108(a)(1) does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d 177; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Basic information includes the identification and description of the complainant. *Id.* Therefore, with the exception of basic information, case number 04-1121TDCJ may be withheld under section 552.108.⁵

However, the OIG raises both sections 552.108(a)(1) and 552.108(a)(2) for case number 93-0229TDCJ. Generally speaking, subsection 552.108(a)(1) is mutually exclusive of subsections 552.108(a)(2). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, sections 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication.

We note that the OIG has not provided any arguments explaining how the release of case number 93-0229TDCJ would interfere either with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Further, the OIG has not provided any arguments explaining that case number 93-0229TDCJ pertains to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.108(a)(2), (b)(2). Thus, the OIG has failed to demonstrate that case number 93-0229TDCJ is excepted from disclosure under section 552.108, and none of it may be withheld pursuant to this exception. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706.

We note that case number 93-0229TDCJ contains a medical record. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code which governs the release of medical records. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

⁵As this ruling is dispositive for this portion of the submitted information, we need not address the other raised exceptions except to note that basic information is not generally excepted under section 552.103. *See* Open Records Decision No. 597 (1991)

confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. Thus, the OIG must release the submitted medical record, which we have marked, only in accordance with the MPA. Open Records Decision No. 598 (1991).

Section 552.101 also encompasses the doctrine constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional: lists of inmate visitors and correspondents, *see* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978).

Based on our review of case number 93-0229TDCJ, we find that portions of the submitted information are protected by constitutional privacy. Accordingly, we conclude that the OIG must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with constitutional privacy.

Finally, we note that section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147. Therefore, the social security numbers we have marked must be withheld pursuant to section 552.147.

In summary, with the exception of basic information and case numbers 93-0229TDCJ and 04-1121TDCJ, the department and OIG must withhold the submitted information under section 552.134 of the Government Code. Further, with the exception of basic information, the OIG may withhold case number 04-1121TDCJ under section 552.108 of the Government Code. The OIG must only release the medical record we have marked in compliance with the MPA. The OIG must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy. Finally, the social security numbers we have marked must be withheld under section 552.147 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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MM/jh

Ref: ID# 245358

Enc. Submitted documents

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